

3-1-2004

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Recommended Citation

John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 Loy. L.A. Int'l & Comp. L. Rev. 359 (2004).

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Separated at Birth: The North American Agreements on Labor and the Environment

JOHN H. KNOX*

The North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC) are similar in many ways, from the concerns that led to their creation to the criticisms leveled against them. They are usually seen as bookends to the North American Free Trade Agreement (NAFTA), addressing parallel problems through virtually identical institutions, the Commission for Labor Cooperation (CLC) and the Commission for Environmental Cooperation (CEC). The agreements are less similar than they first appear, however. Despite their common origins, they reflect fundamentally different approaches to international organization.

On the surface, both reflect the traditional Westphalian view of international law, which assigns states, represented by their national governments, responsibility for creating and implementing law on the international plane. Both modify the Westphalian model slightly by focusing on issues of domestic governance that were traditionally considered outside international purview. Only the NAAEC, however, goes decisively beyond Westphalia by providing roles for nongovernmental actors in the enforcement and further elaboration of its obligations.

Part I of this Article describes the path international law is taking from the strict Westphalian model, and Part II locates the NAAEC and NAALC at different milestones along that path. Part III compares the

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four compliance mechanisms created by the agreements. Their record supports the argument by many scholars that providing nongovernmental actors with access to international compliance mechanisms is a more effective way to promote compliance with environmental and labor norms than is the traditional method of relying on intergovernmental claims. The most effective of the four mechanisms is the CEC citizen submissions procedure, which is also the only one that allows nongovernmental actors to raise claims of noncompliance directly to an impartial international body. Part IV concludes by urging labor and environmental advocates to recognize the relative success of the NAAEC and work to build on its provisions.

I. WESTPHALIA AND BEYOND

The traditional, Westphalian view of international law is that national governments are the only legitimate actors on the international plane; nongovernmental actors have no role to play there, and their interests can be considered only to the extent that they are attributed to or espoused by their government. When the Treaty of Westphalia was signed in 1648, this approach reflected the predominant form of domestic government: because autocratic rulers had sole sovereignty within states, they naturally assumed the sole right to speak on behalf of their states externally. In recent decades, however, as some form of liberal democracy has displaced autocracy in most countries, the two fundamental ideas of liberal democracy—that states should be governed by the *demos* and that individuals have rights that must be respected by their government—have gone from being the manifesto of revolutionaries to the dogma of almost every state in the world, even those whose rulers still cling to autocracy. This sea-change is having two important effects on international organization.

First, international law now recognizes the value of liberal democratic principles in domestic governance. The Universal Declaration of Human Rights and the two international covenants on human rights describe individual rights that governments may not violate. Democracy itself now appears to be on its way to becoming an obligation of international law.¹ International institutions from the United Nations Human Rights Commission to the World Bank increasingly encourage states to bring their domestic regimes into accord with these principles. These changes modify the traditional

1. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46-47 (1992).

Westphalian model, which does not concern itself with states' domestic governance.² By themselves they do not affect the fundamental nature of international law, however, since they leave its creation and implementation under the control of national governments speaking on behalf of their states.

A possible second response to the growth of liberal democracy is to incorporate liberal democratic principles directly into international institutions, by allowing individuals and other nongovernmental actors to participate directly in the creation and enforcement of international law. As nongovernmental actors have become accustomed to participating in domestic government, they have begun to expect, and to press for, opportunities to participate in international organizations. Many scholars have applauded this more basic challenge to the Westphalian model. They argue that increased participation by nongovernmental actors on the international plane has several advantages: it is fairer, since it allows those most affected by international policies to seek to influence them directly;³ it increases the variety and depth of information and ideas available to international decision-makers;⁴ and it is likely to be more effective at promoting compliance with international norms, since nongovernmental actors are willing to push for compliance more strongly than national governments.⁵

In particular, public participation in international institutions may increase the likelihood that international institutions will do more than pay lip service to liberal democratic values in domestic governance. Although governments have adopted universal human rights accords, they virtually never bring international claims on behalf of the nationals of another country. Allowing individuals to have direct access to international institutions may provide a way to avoid this governmental resistance.

2. Anne-Marie Slaughter, *Rogue Regimes and the Individualization of International Law*, 36 NEW ENG. L. REV. 815, 816 (2002). According to the Westphalian formulation, "what sovereign governments did within their own borders was of no concern to their neighbors. States were the subjects of international law; international law regulated only political and economic relations between states, not within them." *Id.*

3. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 480 (Oxford Univ. Press 1995).

4. Kenneth W. Abbott, "Economic" Issues and Political Participation: The Evolving Boundaries of International Federalism, 18 CARDOZO L. REV. 971, 1007-08 (1996).

5. See Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 387 (1997).

Governments often oppose substantial public participation in international regimes. Autocratic governments inherently dislike sharing their power with the public, but even liberal democratic governments often resist greater public participation on the international plane. They may believe that additional voices in international institutions are unnecessary because liberal democratic governments may be trusted to speak for their people, or that public participation at the international level may upset political balances already satisfactorily struck domestically.⁶

Nevertheless, some international institutions now provide important opportunities for public participation. Those that have progressed the furthest are in the fields of human rights and international investment. In institutions such as the Human Rights Committee and the International Labour Organization, and through investment treaties such as Chapter 11 of NAFTA, nongovernmental actors have formal roles in monitoring state compliance with international obligations and may even bring claims of noncompliance on their own behalf against governments. In most other areas, however, nongovernmental actors have been much less successful in obtaining a meaningful degree of participation.

II. MILESTONES ON THE ROAD FROM WESTPHALIA

The NAALC and the NAAEC are important milestones along the road from Westphalia. Both modify traditional Westphalian elements by recognizing and encouraging liberal democratic principles in *domestic* governance. But only the NAAEC allows nongovernmental actors to participate directly on the international plane. The following sections describe first the common elements of the two agreements before turning to their fundamentally different approaches to public participation.

A. *The First Milestone: Shared Modifications to Westphalia*

The agreements arose from parallel concerns about the effect of NAFTA on labor and the environment, and their responses to those

6. These concerns may be lessened to the degree that the interests sought to be pursued by the nongovernmental actors are considered *rights*, and therefore less subject to balancing away through either a domestic or an international political process. In that case, allowing public participation and domestic scrutiny is consistent with the premise of liberal democracy that some rights cannot be overcome even by the majority. Of course, it is often difficult to find agreement on which interests meet these standards.

concerns closely resemble one another. In particular, they have similar obligations, institutions, and provisions for intergovernmental dispute resolution, all of which amend the Westphalian model by focusing attention on issues of domestic governance.

1. Underlying Concerns

In the early 1990s, activists and scholars criticized the proposed NAFTA on labor and environmental grounds. One set of criticisms concerned potential conflicts between international trade agreements on the one hand and domestic laws restricting trade for environmental or labor purposes on the other. This concern was sharply felt in the environmental community after the infamous *Tuna-Dolphin* case, in which an arbitral panel held that U.S. import restrictions on tuna aimed at minimizing dolphin by-catch were in violation of U.S. obligations under the General Agreement on Tariffs and Trade.⁷ Although the decision was not adopted by the GATT parties and therefore had no legal effect, its reasoning suggested that several other U.S. laws restricting trade on environmental grounds might conflict with GATT. By extension, the *Tuna-Dolphin* reasoning also called into question U.S. laws restricting trade on labor grounds.⁸ NAFTA appeared to reproduce the GATT provisions on which the *Tuna-Dolphin* panel had relied.

A second joint source of concern was the U.S.-Mexico border region, especially the *maquiladoras* that had arisen as a result of a Mexican policy designed to encourage foreign investment in factories built along its northern border. Environmentalists argued that rapid industrial growth had overwhelmed water and waste facilities, and labor activists accused the factories of mistreating workers.⁹ Both groups

7. GATT Dispute Settlement Panel Report, United States Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155, 205 (1993), *reprinted in* 30 I.L.M. 1594, 1623 (1991).

8. For example, the Trade Act of 1974 § 301(b), 19 U.S.C. § 2411(b) (2000), authorizes the U.S. Trade Representative to impose trade sanctions on a country if he or she determines that its acts, policies, or practices are "unreasonable" and burden or restrict U.S. commerce. The term "unreasonable" is defined to include acts, policies, and practices which constitute a persistent pattern of conduct that denies workers the right of association, denies workers the right to organize and bargain collectively, permits any form of forced or compulsory labor, fails to provide a minimum age for the employment of children, or fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers. 19 U.S.C. 2411(d)(3)(B)(iii).

9. See David Voigt, Note, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOBAL TRADE 323, 327-29 (1993); Patrick McDonnell, *Mexico Faces Free Trade with High Hopes and Skepticism*, L.A. TIMES, May 25, 1991, at A1, A24.

cited the *maquiladoras* as examples of the problems that result from freeing trade without simultaneously improving social protections.

A third set of parallel concerns was that companies in the United States would be drawn to Mexico to take advantage of its relatively low labor and environmental standards. Ross Perot famously characterized the attraction of Mexico's low wages as the "giant sucking sound."¹⁰ Similarly, environmental activists said that Mexico would become a "pollution haven" for companies seeking to avoid the high costs of compliance with U.S. environmental laws.¹¹

These criticisms were debated during the 1992 presidential election, which occurred after NAFTA had been negotiated but before it had been approved by the U.S. Congress. As Perot attacked NAFTA and President George H.W. Bush defended it, Bill Clinton found middle ground, promising to support ratification of NAFTA only if it were accompanied by side agreements addressing labor and environmental concerns.¹² Once in office, the Clinton Administration focused on the second and third concerns, those that did not require reopening NAFTA itself. To address the problems along the U.S.-Mexico border, it reached a bilateral agreement with Mexico to increase funding for environmental infrastructure in border communities.¹³ To address the differences between Mexican and U.S. labor and environmental protections, it sought trilateral agreements requiring all three NAFTA parties to have high domestic standards. Those agreements became the NAAEC and the NAALC.¹⁴

2. Central Obligations

By the spring of 1993, when negotiation of the trilateral agreements commenced, NAFTA critics and government officials understood that, as written, Mexican standards were not weaker than

10. Rich Thomas, *More Winners Than Losers*, NEWSWEEK, Nov. 29, 1993, at 30.

11. Paulette L. Stenzel, *Can NAFTA's Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423, 428 (1995).

12. "Remarks by Governor Bill Clinton at the Student Center at North Carolina State University," reprinted in *NAFTA & the Environment: Substance and Process* 263 (Daniel Magraw ed., 1995).

13. Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 18, 1993, T.I.A.S. No. 12516, reprinted in 32 I.L.M. 1545 (1993).

14. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]; North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC].

U.S. standards in most respects. In general, Mexican labor law appears more protective of workers' rights than U.S. labor law.¹⁵ While Mexican environmental law is weaker than U.S. law in some areas, a team of U.S. government officials had concluded after visiting Mexico that the "Mexican and U.S. environmental protection regimes as a whole are designed to achieve, when implemented and enforced, comparable levels of environmental protection."¹⁶ Attention therefore shifted to the sizeable gap between the Mexican standards on paper and their implementation in practice, and the negotiations focused on closing that gap by improving compliance with domestic laws.

The core obligations of the agreements that emerged in the early fall of 1993 reflect this emphasis. Each agreement includes a firm commitment by the parties to "effectively enforce" their domestic environmental or labor laws.¹⁷ To avoid the possibility that the governments might gut this obligation by weakening their domestic standards, the agreements also require each party to ensure that its laws provide for high levels of environmental protection and for high labor standards, and to strive to continue to improve those laws.¹⁸

These obligations reflect and promote liberal democratic values in the three countries. Although effective enforcement of these laws may not appear to be an obvious element of liberal democracy, it necessarily follows from the idea that government serves the people. Environmental and labor laws are intended to further the general welfare, but they can be effective only if they are effectively enforced.

Each agreement also contains obligations that more obviously encourage liberal democracy. For example, the labor agreement sets out

15. Mark J. Russo, *NAALC: A Tex-Mex Requiem for Labor Protection*, 34 U. MIAMI INTER-AM. L. REV. 51, 71-108 (2002); Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor Employment Law in Mexico and the United States*, 17 COMP. LAB. L.J. 269, 269 (1996).

16. Office of the General Counsel, U.S. Environmental Protection Agency, *Evaluation of Mexico's Environmental Laws, Regulations and Standards* (Nov. 5, 1993), in *NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS* 583, 615 (Daniel Magraw ed., 1995). See also Anne Rowley, *Mexico's Legal System of Environmental Protection*, 24 ENVTL. L. REP. 10431 (1994) (providing a general overview of Mexico's environmental legal system and concluding that Mexico has established the foundation of a credible legal framework which, if fully enforced, can provide relatively high levels of environmental protection).

17. NAAEC, *supra* note 14, art. 5(1), at 1483-4; NAALC, *supra* note 14, art. 3(1), at 1503. Each agreement also makes clear that a party has not failed to effectively enforce its law where the action or inaction in question reflects a reasonable exercise of official discretion or results from bona fide decisions to allocate resources to enforcement in respect of other environmental/labor matters determined to have higher priorities. NAAEC, *supra* note 14, art. 45(1), at 1494; NAALC, *supra* note 14, art. 49, at 1513.

18. NAAEC, *supra* note 14, art. 3, at 1483; NAALC, *supra* note 14, art. 2, at 1503.

basic labor protections, including freedom of association, the prohibition of forced labor, and the elimination of employment discrimination, that the parties are committed to promote in their domestic laws.¹⁹ Both agreements also promote public participation in domestic legal procedures, by obliging each party to ensure that interested persons may request competent authorities of the party to investigate alleged violations of the environmental/labor laws, and that persons with a "legally recognized interest" have "appropriate access" to administrative or judicial proceedings for the enforcement of the domestic laws.²⁰

3. New Institutions

The institutions created by NAAEC and NAALC appear traditionally Westphalian on the surface: they are each governed by a Council composed of the environmental/labor ministers or their designees,²¹ and each includes a Secretariat of international civil servants with a general mandate to support the Council.²² The NAALC also requires each party to establish a National Administrative Office (NAO) to serve as a point of contact with the other parties and the CLC Secretariat.²³

Each agreement gives its Council broad mandates to promote cooperation among the state parties. The CLC Council's authority is discretionary and, on the whole, very general. The NAALC lists many labor issues on which the Council can promote cooperative activities, but lists no mandates for which it is required to take action.²⁴ The NAAEC is much more specific, and lists mandatory as well as discretionary provisions.²⁵ Both agreements also include catch-all clauses that allow each Council to consider matters other than those explicitly listed in the agreement.²⁶ The effect is to authorize the

19. NAALC, *supra* note 14, ann. 1, at 1515.

20. NAAEC, *supra* note 14, art. 6, at 1484; NAALC, *supra* note 14, arts. 3(2), 4, at 1503.

21. The NAALC explicitly refers to "labor ministers." NAALC, *supra* note 14, art. 9(1), at 1505. Because the U.S. government had not yet decided at the time of the negotiation that its delegate to the CEC would be the administrator of the EPA, the NAAEC refers more generally to "cabinet-level or equivalent representatives of the Parties." NAAEC, *supra* note 14, art. 9(1), at 1485.

22. NAAEC, *supra* note 14, arts. 8(2), 11(5), at 1485, 1487; NAALC, *supra* note 14, arts. 8(2), 13(1), at 1504, 1506.

23. NAALC, *supra* note 14, arts. 15(1), 16(1), at 1507.

24. *Id.* art. 11, at 1505.

25. NAAEC, *supra* note 14, art. 10, at 1485.

26. *Id.* art. 10(2)(s), at 1486; NAALC, *supra* note 14, art. 11(1)(p), at 1505.

Councils to consider virtually any labor or environmental issue of interest to the state parties.

So far, so Westphalian. But the agreements modify the Westphalian model by authorizing the institutions to promote more effective domestic governance. Each Council has authority to oversee the implementation of its agreement, which necessarily includes implementation of the core obligation to effectively enforce domestic laws.²⁷ The CLC Council may promote cooperative activities on "employment standards and their implementation" and "the provision of technical assistance, at the request of a Party, for the development of its labor standards."²⁸ The NAAEC instructs the CEC Council to encourage effective enforcement by each party of its domestic environmental laws and to strengthen cooperation on the development and improvement of those laws.²⁹ Moreover, each agreement promotes greater public participation in the formation of domestic policies concerning labor and environmental issues by encouraging each party to establish a National Advisory Committee to advise it on the implementation and further elaboration of the agreement.³⁰

4. Intergovernmental Dispute Resolution

Part Five of each agreement establishes a dispute resolution procedure.³¹ This procedure is traditionally Westphalian in that it may be triggered by, and directed against, only the state parties,³² but it again modifies the traditional approach by focusing on effective enforcement of domestic laws. Specifically, these Parts provide that if certain conditions are met, an arbitral panel may determine whether a party has engaged in a persistent pattern of failure to effectively enforce a labor or environmental law.³³

A state party may begin the dispute resolution procedure by formally requesting consultations with another party regarding whether

27. NAAEC, *supra* note 14, art. 10(1)(b), at 1485; NAALC, *supra* note 14, art. 10(1)(a), at 1505.

28. NAALC, *supra* note 14, art. 11(1)(j), (o), at 1505.

29. NAAEC, *supra* note 14, arts. 10(3), 10(4), at 1486.

30. *Id.* art. 17, at 1486; NAALC, *supra* note 14, art. 17, at 1507. The NAAEC also authorizes the parties to create Governmental Advisory Committees composed of representatives of federal and state or provincial governments. NAAEC, *supra* note 14, art. 18, at 1489.

31. NAAEC, *supra* note 14, pt. 5, at 1490-3; NAALC, *supra* note 14, pt. 5, at 1509-13.

32. NAAEC, *supra* note 14, art. 22, at 1490; NAALC, *supra* note 14, art. 27, at 1509.

33. NAAEC, *supra* note 14, art. 28(3), at 1493; NAALC, *supra* note 14, art. 33(3), at 1510-11.

it has persistently failed to effectively enforce its law.³⁴ If the consultations fail to resolve the issue, then a party may request a special session of the appropriate Council, which must promptly convene to try to resolve the dispute.³⁵ If the Council fails to resolve the dispute within sixty days, then the party may request the Council to convene an arbitral panel to consider the matter. The Council may convene a panel only if two of the three parties agree.³⁶ If the panel concludes that the accused party has engaged in such a persistent pattern of failure to effectively enforce its domestic laws, the disputing parties have an opportunity to agree on a mutually satisfactory action plan.³⁷ If they do not agree on an action plan or on whether an action plan is being fully implemented, then the arbitral panel may establish an action plan. It may also impose a fine on a party if the panel decides that the party has failed to enforce its law.³⁸ If the party fails to pay the fine within six months of its imposition, the complaining party may suspend NAFTA benefits up to the amount of the fine.³⁹

Under the NAALC, a party may trigger the procedure only if the subject matter of its allegation has already been addressed in a report by an Evaluation Committee of Experts (ECE).⁴⁰ Any party may obtain review by an ECE, which is composed of three independent labor experts, but the review is limited to enforcement of specified labor protections: the prohibition against forced labor, protections against child labor, minimum wages and overtime requirements, the elimination of employment discrimination, protection of migrant workers, and prevention of and compensation for occupational injuries and illnesses. An ECE may not examine allegations concerning the rights to organize, bargain collectively, and strike.⁴¹ Moreover, the only claims a party may

34. NAAEC, *supra* note 14, art. 22(1), at 1490; NAALC, *supra* note 14, art. 27(1), at 1509.

35. NAAEC, *supra* note 14, art. 23(1), at 1490; NAALC, *supra* note 14, art. 28(1), at 1509.

36. NAAEC, *supra* note 14, art. 24(1), at 1490; NAALC, *supra* note 14, art. 29(1), at 1509.

37. NAAEC, *supra* note 14, art. 33, at 1492; NAALC, *supra* note 14, art. 38, at 1511.

38. NAAEC, *supra* note 14, art. 34, at 1492; NAALC, *supra* note 14, art. 39, at 1511. The fine, called a "monetary enforcement assessment," is to be paid to the Commission and used by it to improve enforcement of the environmental or labor law in the losing party. NAAEC, *supra* note 14, ann. 34, at 1496; NAALC, *supra* note 14, ann. 39, at 1516.

39. NAAEC, *supra* note 14, art. 36, at 1493; NAALC, *supra* note 14, art. 41, at 1512. These trade sanctions may not be imposed against Canada. Instead, Canada agreed to allow the Commission to enforce a panel's action plan and fine directly against the federal or provincial government concerned. NAAEC, *supra* note 14, ann. 36A, at 1496; NAALC, *supra* note 14, ann. 41A, at 1507.

40. NAALC, *supra* note 14, art. 27(1), at 1509.

41. NAALC, *supra* note 14, art. 23, at 1508. To be the subject of an ECE review, the matter must also be "trade-related" and covered by mutually recognized labor laws in each of the parties.

bring to formal NAALC dispute resolution are those concerning ineffective enforcement of a party's occupational safety and health, child labor, or minimum wage labor standards.⁴²

The NAAEC has neither limitation. There is no prerequisite equivalent to the requirement for an ECE report, and a request for arbitration may concern failure to effectively enforce any environmental law.⁴³

B. The Second Milestone: Beyond Westphalia

The modifications to the Westphalian model described in the preceding section do not touch the central tenets of that model: that the only actors allowed on the international plane are states and that national governments are their only valid representatives. While both agreements share those modifications, the NAAEC goes further in two respects.

First, the NAAEC creates a Joint Public Advisory Committee (JPAC) composed of citizens from the three North American countries, which may advise the Council on any topic within the scope of the agreement. Second, the NAAEC allows private citizens and organizations to promote compliance with the core obligation of the

Id. art. 23(3). The former term is defined so broadly as to be virtually certain always to be met; Article 49 provides that it means "related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the Parties; or (b) that compete, in the territory of the Party whose labor law [is alleged to have been ineffectively enforced] with goods or services produced or provided by persons of another Party." To be covered by "mutually recognized labor laws," laws of both concerned parties must "address the same general subject matter in a manner that provides enforceable rights, protections or standards." *Id.* art. 49(1), at 1514. The purpose of this provision seems to have been to avoid reviews of the enforcement of standards unless both parties had enacted laws in the same general area. As a further protection against isolating any one party, the NAALC provides that the ECE is to analyze patterns of enforcement by all three parties as they relate to the matter. *Id.* art. 23(2), at 1508. To that end, it may take into account information from the public as well as the parties. *Id.* art. 24(1)(d), at 1508.

42. *Id.* art. 27(1), at 1509. In other words, the dispute resolution procedure may not review allegations concerning the prohibition against forced labor, employment discrimination, or migrant workers, all of which may be the subject of an ECE report, as well as allegations concerning the rights to organize, bargain collectively, and strike, which may not even be considered by an ECE.

43. NAAEC, *supra* note 14, art. 22(1), at 1490. The term "environmental law" is defined broadly. *Id.* art. 45(2), at 1495. To take the claim to arbitration, the alleged persistent pattern must also "relate[] to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the Parties; or (b) that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party." *Id.* art. 24(1), at 1490. In practice, this requirement, like the equivalent criterion in the NAALC, should be easy to meet.

agreement by filing citizen submissions with the CEC Secretariat alleging that a state party has failed to effectively enforce its domestic environmental law.⁴⁴ The procedure may result in investigative reports known as factual records.⁴⁵

These openings for public participation are far from true international liberal democracy.⁴⁶ The role of JPAC is strictly advisory and the citizen submissions procedure cannot force the governments to comply with their legal obligations.⁴⁷ Moreover, both are subject to the ultimate control of the governments, which appoint the members of JPAC and decide whether to authorize and publish factual records. Nevertheless, JPAC and the submissions procedure make the NAAEC virtually unique in international environmental law and the CEC highly unusual among all international institutions. They represent a long step down the road away from Westphalia. This section examines each in turn.

1. Public Participation in International Legislation: The Joint Public Advisory Committee

Although the Councils of the CEC and the CLC are not legislatures in any usual sense, they are able to make decisions that bind their institutions and to recommend courses of action to the parties. In that sense they are the legislative organs of the organizations. Like most international agreements, the NAALC leaves the international legislative process entirely to the governments. It does not even provide that CLC Council meetings must be open to the public, much less give the public any voice into Council decisions other than through their national governments. The NAAEC, in contrast, requires the CEC Council to hold public meetings in the course of all of its regular sessions and to make all of its decisions and recommendations public.⁴⁸

Other international institutions have gone this far. But the NAAEC goes much farther, by creating a fifteen-member JPAC as one of the three constitutive elements of the CEC, together with the Council and

44. NAAEC, *supra* note 14, art. 14, at 1489.

45. *Id.* art. 15.

46. For a proposal for a more sweeping move toward liberal democracy at the international level, see Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191 (2000).

47. NAAEC, *supra* note 14, art. 16, at 1489.

48. *Id.* arts. 9(4), 9(7), at 1485. The Council may decide not to make a decision or recommendation public if it so agrees by consensus. *Id.* art. 9(7).

the Secretariat.⁴⁹ JPAC has very broad mandates: to "provide advice to the Council on any matter within the scope of this Agreement . . . and on the implementation and further elaboration of this Agreement," and to "provide relevant technical, scientific or other information to the Secretariat."⁵⁰ JPAC also has a large degree of autonomy. It chooses its own chair, who may call meetings without Council approval as long as a majority of JPAC members concur.⁵¹

While the governments retain an important measure of control over JPAC through their power to appoint its members,⁵² they have not "packed" JPAC with members certain to support their positions. Although they have appointed some ex-government officials, for the most part they have named a diverse roster that includes academics, heads of environmental organizations, and business executives.⁵³

These individuals have taken seriously their responsibility to provide independent advice. John Wirth, one of the initial U.S. appointees to JPAC, has written that at its very first meeting, in July 1994, the members "chose to interact as North Americans rather than see themselves as advocates or defenders of national positions or as representatives of any particular private voluntary organization or interest group."⁵⁴ Remarkably, their independence has not prevented them from reaching consensus; to date, their advice has always been issued unanimously. Former EPA Administrator Carol Browner, who was the U.S. member of the CEC Council for its first seven years, has said that this unanimity has been critical in influencing the Council: "[B]ecause JPAC talked with one voice, it was a voice ministers had to listen to."⁵⁵

The Council may have to listen to JPAC advice, but it does not have to follow it. JPAC has been unable to convince the governments to increase their fiscal contributions to the CEC, for example, or to conclude their long-standing negotiations on a North American

49. *Id.* art. 8(2).

50. *Id.* art. 16(4), 16(5), at 1489.

51. *Id.* art. 16(2), 16(3).

52. *Id.* art. 16(1). If the party decides, it may allow its National Advisory Committee to appoint the members of the JPAC. *Id.*

53. For a list of all of the members appointed through early 2003 and a description of many of their backgrounds, see John D. Wirth, *Perspectives on the Joint Public Advisory Committee*, in *GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION* 199, 209-10, 212-13 (David L. Markell & John H. Knox eds., 2003) [hereinafter Wirth, *Perspectives on JPAC*].

54. *Id.* at 201.

55. *Id.*

agreement on transboundary environmental assessment.⁵⁶ Nevertheless, John Wirth describes several instances where JPAC has affected CEC policy.⁵⁷ Perhaps most importantly, JPAC has consistently championed the citizen submissions procedure, as described below in Part III.

Public participation through institutions like JPAC is far more likely to produce meaningful results than simply allowing public interventions at meetings of government officials, for several reasons. Over time, the JPAC members become experts on many aspects of CEC policy. They also become knowledgeable at conducting public meetings and synthesizing the input that they receive. The ministers know that JPAC members will continue to be engaged in issues they raise, and that they will expect the ministers to respond to their concerns in detail.

The June 2003 CEC Council session in Washington, D.C. illustrated the relative advantages of a permanent advisory committee. The public portion of the Council session allowed a long succession of speakers at an open microphone to address the three ministers sitting on a raised stage before them. Although many of the interventions were interesting and thoughtful and the ministers tried to respond in kind, the exchange was truncated and there was no possibility of a sustained dialogue. Later that day, the Council members held a closed session with JPAC.⁵⁸ The ministers sat at a conference table with the JPAC members they had appointed, many of whom they knew or had come to know personally. The statements by JPAC members often echoed those made in the public session a few hours earlier, but in this meeting the Council ministers and JPAC members were able, and even required, to discuss the issues in more depth. Moreover, this meeting was one in a continuing series. Council members knew that if they rejected JPAC's recommendations, they would have to justify their decision at the next joint meeting.

2. Public Participation in the Promotion of Compliance: The Citizen Submissions Procedure

While JPAC offers individuals the opportunity to influence the Council, other NAAEC mechanisms allow nongovernmental actors to

56. *Id.* at 202-03, 208.

57. *See, e.g., id.* at 201 (advising Council on how to trim programs from early CEC work plans), 203 (reviewing and giving imprimatur to Secretariat report on controversial issue), 205 (arguing for inclusion of its representatives in high-level intergovernmental meetings on CEC policy).

58. Members of the National Advisory Committees were allowed to observe but not intervene.

participate in monitoring the parties' implementation of their commitments, especially their obligation to effectively enforce their environmental laws. The most important of these mechanisms is the citizen submissions procedure established by Articles 14 and 15 of the NAAEC, which allow any nongovernmental organization or person to file a submission with the Secretariat claiming that a party is failing to effectively enforce its environmental law.⁵⁹

The procedure is administered by the CEC Secretariat, which reviews every submission to determine whether it meets certain criteria and whether, in light of any response from the party concerned, the submission warrants developing an investigative report, known as a "factual record."⁶⁰ If so, the Secretariat requests authorization from the Council, which may approve it by a two-thirds vote.⁶¹ In preparing a

59. NAAEC, *supra* note 14, art. 14(1), at 1488. The CEC has two other monitoring mechanisms, each of which also provides for substantial public input. First, the Secretariat prepares an annual report, which must include information on the actions taken by each party in connection with its obligations under the NAAEC, including its environmental enforcement activities, and "relevant views and information submitted by nongovernmental organizations and persons." *Id.* art. 12(2), at 1487. In contrast, the CLC Secretariat is instructed only to prepare an annual report to the Council on its own activities and expenditures. NAALC, *supra* note 14, art. 13(5), at 1506.

Second, Article 13 of the NAAEC authorizes the Secretariat to prepare a report on any matter within the scope of the CEC annual program without the need for Council approval. Since the annual program includes projects touching on an extremely wide array of environmental issues, this language authorizes the Secretariat to report on almost any environmental topic it chooses. Unless the Council objects by a two-thirds vote, the Secretariat may also prepare a report on a topic outside the scope of the annual program, as long as it relates to the "cooperative functions" of the NAAEC, which are understood to cover all of the topics covered by the agreement except allegations of failure to effectively enforce. In preparing an Article 13 report, the Secretariat may draw on information submitted by nongovernmental actors. NAAEC, *supra* note 14, art. 13(2)(b), at 1488. Moreover, nothing prevents the Secretariat from taking into account suggestions from nongovernmental actors in deciding whether to prepare such a report, and in practice at least two reports appear to have been triggered by private submissions. For a description and analysis of one of those reports, see A. Dan Tarlock & John E. Thorson, *Coordinating Land and Water Use in the San Pedro River Basin: What Role for the CEC?*, in GREENING NAFTA, *supra* note 53, at 217. The CLC Secretariat also has a mandate to prepare reports, but the reports are to be prepared in accordance with terms of reference set by the Council; nongovernmental actors have no role. NAALC, *supra* note 14, art. 14, at 1506.

60. Among other requirements, the submission must clearly identify the submitter and provide sufficient information to allow the Secretariat to review the submission. NAAEC, *supra* note 14, arts. 14(1), 15(1), at 1488. In deciding whether to request a response from the party, the Secretariat must also consider factors such as whether the submission alleges harm to the submitter, whether private remedies available under the party's law have been pursued, and whether the submission "raises matters whose further study in this process would advance the goals of this Agreement." *Id.* art. 14(2)(a)-(d), at 1488.

61. *Id.* art. 15(1)-(2), I.L.M. at 1488. The Council also decides by a two-thirds vote to make the factual record public. *Id.* art. 15(7), I.L.M. at 1489. In practice, it has never decided not to publish a factual record.

factual record, the Secretariat takes into account not only information submitted by the parties, but also any relevant information provided by interested persons and JPAC, as well as any information developed by independent experts or the Secretariat itself.⁶² Although this procedure is not strictly adjudicative—its decisions are not binding, and probably may not even conclude whether the party has failed to effectively enforce its law—I have argued elsewhere that this type of complaint-based monitoring is similar in many ways to adjudication between nongovernmental actors and governments.⁶³ It allows private parties to file complaints arguing that governments have violated their international obligations, it treats the governments as parties to the dispute, and it asks independent experts to review the complaints in accordance with set criteria and issue reports on the issues they raise.⁶⁴

The NAALC also provides for a submissions procedure, at the domestic rather than the international level. The NAALC does not allow nongovernmental actors to file complaints directly with the CLC Secretariat. Instead, it requires each government's NAO to establish a procedure for receiving public communications concerning labor law matters arising in the territory of the *other* parties to the agreement.⁶⁵ Nongovernmental actors may use the procedure to pressure governments to raise their issues through the intergovernmental mechanisms provided by NAALC, beginning with NAO-to-NAO consultations,⁶⁶ and proceeding through ministerial consultations,⁶⁷ ECE reports,⁶⁸ and intergovernmental arbitration.⁶⁹

The NAALC submissions procedure is thus parallel to the NAAEC citizen submissions procedure in important respects. Both are triggered by a nongovernmental submission, which under the NAALC may lead to an independent investigative report by an ECE if one of the parties to

62. *Id.* art. 15(4), at 1489.

63. John H. Knox, *A New Approach to Compliance with International Environmental Law: the Submissions Procedure of the NAFTA Environmental Commission*, 28 *ECOLOGY L.Q.* 1, 34 (2001).

64. *See id.* at 58, 75. For more on the procedure, see Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 *LOY. L.A. INT'L & COMP. L. REV.* 389, 394-398 (2004); and David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 *GEO. INT'L ENVTL. L. REV.* 545, 550-63 (2000).

65. NAALC, *supra* note 14, art. 16(3), at 1507. The NAALC sets out no other requirements for the procedure, instead allowing each NAO to establish it in accordance with its domestic law. In practice, the governments allow submissions complaining of ineffective enforcement.

66. *Id.* art. 21, at 1507.

67. *Id.* art. 22, at 1508.

68. *Id.* art. 23, at 1508.

69. *Id.* art. 29, at 1509.

the NAALC requests, and under the NAAEC may lead to a report by the CEC Secretariat if the Secretariat requests and two members of the CEC Council agree. Further, in principle, any state party can take an allegation of ineffective enforcement raised through either procedure to formal intergovernmental dispute resolution under Part Five of the agreements, although arbitration will be available only if the respective Council approves the government's request by a two-thirds vote.⁷⁰ The chief difference between the two procedures is that the NAALC procedure is administered entirely by the governments, while the NAAEC procedure is administered by an independent international body, the CEC Secretariat, which receives submissions directly from the nongovernmental submitters. The NAAEC is thus post-Westphalian in ways that the NAALC is not.

III. THE IMPORTANCE OF PUBLIC PARTICIPATION IN INTERNATIONAL COMPLIANCE MECHANISMS

Together, the NAAEC and the NAALC create four mechanisms designed to induce compliance by the parties with their obligations to effectively enforce their domestic labor and environmental laws. Although they have the same goal and the same parties, the mechanisms are at three distinct points along the path from Westphalia. The most Westphalian are the two dispute resolution procedures, which are triggered by a government claim and may lead to an arbitral decision opening the door to fines or trade sanctions. The NAALC submissions procedure gives a role to nongovernmental actors to bring complaints to a government, but leaves to the government the sole right to raise the complaints internationally. The NAAEC submissions procedure goes furthest, by allowing nongovernmental actors to bring their complaints of ineffective enforcement to an impartial international body. Like the NAALC submissions procedure, however, it leads only to a nonbinding report.

The compliance mechanisms therefore provide a kind of natural experiment, which sheds light on which types of international procedures are most effective at promoting governmental compliance with international labor and environmental obligations and, more specifically, compliance with obligations to effectively enforce domestic labor and environmental laws. Comparing the records of the two citizen submission procedures with the records of the two

70. Investigative reports by ECEs and intergovernmental arbitration under the NAALC are limited to certain types of labor issues, as described above. *Supra* Part II.A.4.

traditional intergovernmental dispute resolution procedures leads to two general conclusions: (1) that nongovernmental actors are far more likely than governments to trigger such compliance mechanisms, and (2) that "hard" sanctions are not always necessary for compliance mechanisms to be effective. A comparison of the two citizen submissions procedures with one another suggests two further conclusions: (1) that submissions procedures are more likely to be effective if the submissions regularly result in independent rather than governmental reports, and (2) that governments will authorize independent reports only if they are under continuing pressure from independent bodies to do so.

*A. Comparing the Citizen Submissions Procedures to
Intergovernmental Dispute Resolution*

The traditional view of compliance, which is still shared by many labor and environmental advocates, is that to be effective compliance mechanisms must be able to coerce reluctant parties into changing their behavior. In other words, they must have "teeth." Fines and trade sanctions qualify; nonbinding reports do not. According to this view, the two intergovernmental dispute resolution procedures should be far more effective at promoting compliance than the two citizen submissions procedures. In fact, when the NAALC and the NAAEC were signed, the Clinton Administration portrayed those provisions as the teeth necessary to ensure that the parties would effectively enforce their labor and environmental laws.

The burgeoning field of compliance studies has shown that this view is too limited, in at least two respects.⁷¹ First, traditional methods of promoting compliance rely on the willingness of one state to pursue claims against another, something states are often reluctant to do for fear of triggering reciprocal claims or of jeopardizing other aspects of interstate relationships.⁷² Allowing nongovernmental actors to raise claims of noncompliance may avoid this governmental bottleneck, since they do not share the concerns that dissuade governments from acting.⁷³

71. It is impossible in this space to do full justice to the scholarship on compliance. A good starting point is Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538-53 (Walter Carlsnaes et al. eds., 2002).

72. David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 779 (1994) [hereinafter Wirth, *Reexamining Decision-Making Processes*].

73. Helfer & Slaughter, *supra* note 5, at 387.

Second, the traditional view overlooks methods of promoting compliance that rely on persuasion rather than coercion. Such methods may include building the capacity of states to comply, amicably clarifying unclear obligations, and monitoring states' performance. In this respect, nonbinding reports may play a key role by identifying compliance problems so that appropriate "managerial" tools may be brought to bear on them.⁷⁴ By drawing attention to a state's behavior in violation of its obligations, the "sunshine" provided by such reports may even directly induce the state to comply in order to avoid public embarrassment.

The experience of the NAALC and NAAEC compliance mechanisms supports each of these conclusions. First, the two intergovernmental procedures have been dead letters. As of January 1, 2004, ten years after the entry into force of the agreements, no government has brought a claim to even the first, consultative, stage under either procedure.⁷⁵ In defense of the procedures, one might note that they are designed only to address *persistent* patterns of failure to effectively enforce, and that the NAALC limits the scope of claims that can be brought under it,⁷⁶ but these points simply confirm that the governments have never intended for the procedures to be used. Over the same ten-year period, the citizen submissions procedures have received seventy submissions, forty-two to the CEC and twenty-eight to NAOs under the labor agreement.⁷⁷ Nongovernmental actors are willing to bring the claims of ineffective enforcement that governments will not raise.

Second, the records indicate that the reporting procedures are at least modestly effective at promoting compliance. Jonathan Graubart has conducted the most thorough study of the results of the labor and environmental submissions procedures. He suggests that the procedures can be effective in particular cases if they are used as part of a coordinated political campaign, and describes how submitters have used the procedures to draw media and political attention to desired changes

74. See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 154-73 (1995).

75. In fact, the governments have yet to agree on the model rules of procedure to be used by arbitral panels under the NAAEC, as that agreement requires them to do. NAAEC, *supra* note 14, art. 28(1), at 1491.

76. *Supra* Part II.A.4.

77. See Citizen Submissions on Enforcement Matters, available at <http://www.cec.org> (last visited Apr. 27, 2004); Summary of Public Communications (Mar. 2004), available at http://www.naalc.org/english/pdf/pcommtable_en.pdf.

in policy. He identifies labor policy changes in Mexico, in particular, that have resulted from such campaigns, including promises by several U.S. companies to discontinue pregnancy screening of job applicants in *maquiladoras*, Mexican government pressure to allow an independent union in Mexico to be registered, and agreement by the Mexican government to support secret-ballot elections for union certification.⁷⁸ Similarly, he argues that environmental "[a]ctivists have used NAAEC submissions to give new momentum to stalled political and legal efforts at home and to boost ongoing political and legal campaigns, such as protecting fish habitat, protesting the dumping of toxic wastes, and promoting greater biodiversity. . . . [M]any of the complaints have provided additional momentum to specific environmental drives, helped sustain activists' resolve, and pressured governmental authorities to justify their actions publicly. The most successful submissions have even succeeded in prompting concrete changes in behavior from the complained-of government."⁷⁹

The success of the submissions procedures should not be overstated. Certainly they have not resulted in wholesale improvement in the enforcement of environmental or labor laws in North America. For example, Kevin Gallagher has described the decline of Mexican efforts to enforce environmental laws since NAFTA entered into force.⁸⁰ Nevertheless, as Gallagher notes, the NAAEC submissions procedure can offer a way to counter this trend by increasing public attention to specific instances of government inaction.⁸¹

Graubart's analysis of the two submissions procedures suggests that much of their utility results from high-visibility public reports investigating the allegations raised by the submitters. He emphasizes that "critical to [labor] activists' success has been strong validation by the [NAO] review body. Only one case . . . with a strong finding of fault failed to yield any meaningful results from the perspective of the submitters. By contrast, no case with a weak or negative NAO finding has achieved even modest results."⁸² Along the same lines, the Mexican

78. Jonathan Graubart, *Giving Teeth to NAFTA's Labour Side Agreement*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION 203, 204 (John J. Kirton & Virginia W. Maclaren eds., 2002) [hereinafter Graubart, *Giving Teeth to NAFTA*].

79. Jonathan Graubart, *Giving Meaning to New Trade-Linked "Soft Law" Agreements on Social Values: A Law-in-Action Analysis of NAFTA's Environmental Side Agreement*, 6 UCLA J. INT'L L. & FOREIGN AFF. 425, 430 (2002) [hereinafter Graubart, *Soft Law Agreements*].

80. Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience*, in GREENING NAFTA, *supra* note 53, at 117-24.

81. *Id.* at 128.

82. Graubart, *Giving Teeth to NAFTA*, *supra* note 78, at 216-17.

attorney whose submission led to the first CEC factual record, on a proposed pier in Cozumel, has credited the report with causing several environmentally beneficial effects, including the creation of a natural protected area by the Mexican government.⁸³ Similarly, the attorney whose submission spurred the second factual record, on the environmental effects of hydroelectric projects in British Columbia, says that the process generated "more focused public attention on the issue by providing a clearer picture of what was occurring and of the weakness of federal enforcement activities. Moreover, this public momentum helped spur the government into instituting [a new permitting procedure] and in giving it more sanctioning authority."⁸⁴

B. Comparing the Citizen Submissions Procedures

Comparing the effectiveness of the submissions procedures is difficult, because they concern two areas of law and policy that may raise significantly different types of obstacles to effective enforcement. One possible indirect measure of effectiveness is the degree to which each procedure is attracting submissions. It seems likely that potential submitters to either procedure conduct a similar cost/benefit analysis in deciding whether to file submissions. Since each procedure is designed to focus attention on alleged instances of ineffective enforcement, presumably submitters will use it only if they believe that its contribution to their efforts to improve governmental enforcement of domestic environmental or labor laws outweighs the costs to the submitters of pursuing the submission.

This measure suggests that submitters believe both of these procedures are at least somewhat effective, since they have filed a number of submissions with each. Many of these submissions were filed in the first years after the procedures were established, however, when submitters could not know how successful the procedures would prove. After a submissions procedure has begun to develop a record, potential submitters are likely to use it only if it has actually demonstrated its ability to induce governmental policy changes substantial enough to justify the time and expense required to file a submission. As a result, a more telling measure of the effectiveness of a procedure is the number

83. Gustavo Alanís Ortega, *Public Participation Within NAFTA's Environmental Agreement: The Mexican Experience*, in LINKING TRADE, ENVIRONMENT AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES 183, 184-85 (2002).

84. Graubart, *Soft Law Agreements*, *supra* note 79, at 443.

of submissions filed after submitters have had the opportunity to see its initial results.

By this measure, the environmental procedure is turning out to be more effective. Table 1 tracks the number of submissions filed annually with the CEC Secretariat under NAAEC Article 14 and with the NAOs pursuant to the NAALC. Each submissions procedure received twenty submissions in the first five years after the agreements entered into force. In the most recent five years, however, the CEC received twenty-two and the labor procedure received eight. In the most recent four years, from January 1, 2000 to January 1, 2004, the trend is even more marked: the NAAEC procedure has received twenty submissions and the NAALC procedure only six.⁸⁵ The NAALC procedure thus appears to be in decline, and perhaps at risk of fading away altogether.⁸⁶

Table 1. Annual Number of Submissions Files with Each Procedure

	1994	1995	1996	1997	1998	
With CEC	0	2	4	7	7	
With NAOs	4	1	2	3	10	
	1999	2000	2001	2002	2003	<u>Total</u>
With CEC	2	6	3	5	6	42
With NAOs	2	1	2	0	3	28

The explanation for this disparity may be that labor submissions never result in an independent investigative report, while environmental submissions often do. As Table 2 indicates, of the twenty-eight submissions filed under the NAALC through the end of 2003, not one led to an ECE report. Over the same period, twelve of forty-two submissions to the CEC were approved for a factual record, and a thirteenth was authorized in March 2004.⁸⁷

85. The figures in Table 1 and Table 2 are compiled from information about submissions available at the websites of the two institutions: www.cec.org and www.naalc.org.

86. Widespread decisions not to use a submissions procedure, for whatever reason, will ensure its ineffectiveness, since such a procedure cannot be effective if it does not receive submissions. See Helfer & Slaughter, *supra* note 5, at 301 ("A court that is scarcely used, for whatever reason, cannot hope to make much of a mark."). Of course, submissions might decline over time because there are fewer violations about which potential submitters might complain, but in light of continuing controversies over labor and environmental issues in each of the three North American countries, that seems unlikely to be the situation in this case.

87. Council Res. 04-03, Commission for Environmental Cooperation, C/C.01/04-01/RES/03 (Mar. 12, 2004), http://www.cec.org/files/pdf/sem/02-1-Res04-03_en.pdf.

Table 2. Procedural Disposition of Submissions as of Jan. 1, 2004

	<u>CEC</u>	<u>NAOs</u>
Total Number Filed	42	28
Awaiting Procedural Decision	6	3
Rejected by Secretariat/NAO	20	5
Withdrawn by Submitter	1	4
Recommended for Ministerial Consideration	15	13
Approved for Factual Record/ECE Report	12	0

As the preceding section indicates, the utility of a reporting procedure depends on the value of the reports it produces. To date, the NAALC submissions have resulted only in reports by the NAOs and referrals to the labor ministers for consultations, which typically conclude with ineffectual agreements to address the issue at a very general level.⁸⁸ Although the U.S. NAO, in particular, regularly holds public hearings, solicits evidence from companies and the accused government as well as from the submitters, and issues "forceful criticisms," in some cases "strongly validat[ing] almost all of the allegations" in the submission,⁸⁹ government-produced NAO reports are still likely to be considered less probing and impartial than the "harder sunshine" of an ECE report prepared by independent experts.⁹⁰

The inability of labor submitters to obtain an ECE report helps to explain why they seem to have lost much of their initial interest in the procedure. Because the CEC procedure regularly produces the impartial investigative reports that have eluded the labor procedure, environmental submitters can use factual records to obtain additional

88. Marley S. Weiss, *Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 750 (2003) ("Settlements [as a result of ministerial consultations] have now assumed an entrenched pattern of yet another tri-national seminar to study the problem and benchmark best practices, even when the problem has already been fully examined, and it is clear to all that only through domestic changes in labor law policy and practices will compliance with the NAALC actually occur.").

89. Graubart, *Giving Teeth to NAFTA*, *supra* note 78, at 203, 212-13. The Mexican NAO has been much more reluctant to hold public hearings or endorse submitters' allegations, instead suggesting only that the labor ministers consult with one another on the subject of the submission. *Id.* at 213. The U.S. and Mexican NAOs have received the majority of the submissions: seven of the nine submissions against the United States were filed with the Mexican NAO, and fifteen of the seventeen concerning Mexico with the U.S. NAO. Of the four submissions filed with the Canadian NAO, one is still pending, one was withdrawn, one was dismissed, and one resulted in a public hearing and findings. *See id.* at 213-14.

90. *See* Weiss, *supra* note 100, at 750.

information to support their allegations and additional publicity for their arguments. It seems likely that environmental submitters see the reports prepared by the CEC Secretariat as useful in ways that reports on the labor submissions prepared by the other governments are not, and that they are therefore more willing to continue to bring complaints of ineffective enforcement.

It is not obvious why the environmental procedure should have resulted in so many more independent reports. Governments are clearly reluctant for ECE reports to examine labor issues,⁹¹ but it is not apparent why they would be more willing for independent investigators to examine environmental issues. They have as much control over whether to authorize a CEC factual record as they do over whether to authorize an ECE report. In fact, an ECE report would appear to be less subject to governmental stonewalling, since any government may obtain an ECE report upon request, while a CEC factual record requires the affirmative votes of two governments on the Council. Nevertheless, while no government has yet requested an ECE report, the CEC Council has approved thirteen of the fifteen requests for a factual record brought to it.

Possible explanatory factors are that: (1) allegations of ineffective enforcement are less controversial in the environmental arena, (2) a NAO report dissipates much of the political pressure on governments to produce a concrete response to a submission, or (3) the NAALC includes particular disincentives to request an ECE report, by providing that the ECE will analyze patterns of practice by all three parties in the enforcement of their labor standards as they apply to the particular issue and by making clear that the ECE report is a necessary first step toward requesting formal intergovernmental arbitration.

It seems likely, however, that a key factor is the post-Westphalian structure of the CEC submissions procedure. While labor submissions are made to governments that have complete discretion over whether and how to pursue them on the international plane, environmental submissions are made directly to an international body, the CEC Secretariat. The NAAEC gives the Secretariat a mandate to review the submissions objectively and to make a legal decision on whether they warrant a factual record. This mandate takes the initial decision of

91. See *id.* ("Despite all of the attention focused on the long, drawn out NAALC process, and the unfairness of its exclusion of certain labor rights from higher stages of the process, the truth is that none of the cases are progressing, no matter what their topic. The explanation seems to lie in the control of the process by diplomats and political appointees, who are extremely reluctant to take cases to an ECE, even when they are eligible to do so.").

whether an independent report is justified out of the governments' hands. The Secretariat's impartiality and thoroughness, which it demonstrates by its careful quasi-judicial opinions as well as its rejection of submissions that do not meet the NAAEC criteria, lend its recommendations added weight.⁹² Even if the governments express disagreement with a recommendation, which they often do, they evidently find it difficult to reject the recommendation entirely. Usually even the government against which the submission is directed, which has typically filed a response with the Secretariat arguing that the submission should *not* justify a factual record, ends up voting to authorize it.

Perhaps because of the very effectiveness of the environmental procedure at drawing attention to alleged lapses by the governments, however, they have often threatened to amend the procedure to take more control over it. Environmental groups and the National Advisory Committees have defended the procedure, but the loudest and most important defense has probably come from JPAC, the other post-Westphalian element of the CEC. It has regularly urged the Council to respect the independence of the procedure and to avoid changes that might reduce its transparency and effectiveness, and its efforts have often been successful.

For example, in 1999 and 2000, government officials considered changes that would have given them more control over the Secretariat's preparation of factual records.⁹³ JPAC strongly opposed these proposals and helped to convince the Council not to adopt them.⁹⁴ Instead, the Council decided in June 2000 to give JPAC a formal role in the submissions procedure, by asking it to conduct a public review of any issues concerning the procedure referred to it by the Council, the Secretariat, or members of the public, "with a view to providing advice to the Council on how those issues might be addressed."⁹⁵ At the same time, the Council asked JPAC to prepare a report on the lessons learned from the experience with the procedure up to that point. The ensuing

92. As Table 2 shows, the Secretariat has rejected a higher percentage of submissions on procedural grounds than have the NAOs. Of the thirty-six submissions to the CEC that have received a procedural decision, the Secretariat has rejected twenty, or fifty-six percent, whereas the NAOs have rejected only five of twenty-five submissions, or twenty percent.

93. Wirth, *Perspectives on JPAC*, *supra* note 53, at 206.

94. *Id.* The National Advisory Committees to the United States and Canada also weighed in, as did many environmental groups, and even editorial writers. See Knox, *supra* note 64, at 70-73.

95. Council Res. 00-09, CEC, C/00-00/RES/09/Rev.2 (June 13, 2000), http://www.cec.org/pubs_docs/documents/index.cfm?ID=208&varlan=english.

report recommended, *inter alia*, that the Council eliminate restrictions it had previously placed on the transparency of the procedure and publish its reasons whenever it denied a recommendation for a factual record.⁹⁶ The Council adopted those recommendations.⁹⁷

Since November 2001, a new problem has arisen: the Council has often approved Secretariat requests for an investigative report only after narrowing the scope of the report in ways that severely undercut its utility. For example, the Secretariat recommended a factual record to investigate an allegation that the U.S. government was failing to effectively enforce a prohibition in domestic law against killing migratory birds. Although the allegation concerned logging operations throughout the United States, the Council instructed the Secretariat only to investigate two specific cases identified in the submission and not to examine the broader allegation.⁹⁸ JPAC immediately expressed concerns about the Council's actions.⁹⁹ After conducting a public review in accordance with its June 2000 mandate from the Council, in December 2003 JPAC "strongly recommend[ed] that Council refrain in the future from limiting the scope of factual records presented for decision by the Secretariat."¹⁰⁰ Again, the Council appears to have responded to the pressure: in March 2004, it authorized a broad factual

96. JOINT PUBLIC ADVISORY COMMITTEE [JPAC], LESSONS LEARNED: CITIZEN SUBMISSIONS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, FINAL REPORT TO THE COUNCIL OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION (June 6, 2001), http://www.cec.org/files/pdf/JPAC/rep11-e-final_EN.PDF.

97. Council Res. 01-06, CEC, C/01-00/SR/01/Rev.3 (June 29, 2001), http://www.cec.org/pubs_docs/documents/index.cfm?ID=523&varlan=english. See Christopher Tollefson, *Stormy Weather: The Recent History of the Citizen Submissions Process of the North American Agreement on Environmental Cooperation*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION, *supra* note 78, at 153, 169-70.

98. Council Res. 01-10, CEC, C/C.01/01-06/RES/04/Final (Nov. 16, 2001), http://www.cec.org/pubs_docs/documents/index.cfm?ID=528&varlan=english. For an analysis of this and three other resolutions adopted in November 2001 that similarly restrict the scope of factual records, see David L. Markell, *The CEC Citizen Submissions Process: On or Off Course?*, in GREENING NAFTA, *supra* note 53, at 274-77. See also Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415, 426 (2004).

99. JPAC, CEC, Advice to Council 01-09 (Nov. 30, 2001), http://www.cec.org/pubs_docs/documents/index.cfm?ID=527&varlan=english; see Wirth, *Perspectives on JPAC*, *supra* note 53, at 207.

100. JPAC, CEC, Advice to Council 03-05 (Dec. 17, 2003), http://www.cec.org/pubs_docs/documents/index.cfm?ID=1151&varlan=english. The JPAC wanted to conduct a public review on the issue immediately after the November 2001 resolutions, but the Council instructed it to wait until the factual records authorized by the resolutions had been completed. See *id.*

record on whether Canada has effectively enforced migratory bird protections on logging throughout Ontario.¹⁰¹

The Secretariat and JPAC can protect this avenue for public participation, but they cannot force the public to use it. The biggest problem currently facing the CEC submissions procedure is that recent submissions have been directed only against Canada and Mexico; no submission concerning U.S. law has been filed since March 2000. This discrepancy may be because U.S. domestic environmental law offers potential submitters more avenues of redress than does Canadian or Mexican law, or that submitters have become discouraged by the relatively inconsequential effects of the few submissions they have brought against the United States. This pattern may call into question the long-term viability of the procedure, because the Canadian and Mexican governments can be expected to resist the procedure even more strongly if it is aimed only at them.

IV. UNLEARNED LESSONS

The differences between the NAAEC and the NAALC are not accidental. They result primarily from divergent decisions of labor unions and environmental organizations during the NAFTA debate. While unions made little or no effort to influence the negotiation of the labor agreement, several important environmental groups offered to support NAFTA if the environmental agreement incorporated their proposals, including their proposals for public participation. Unsurprisingly, the governments departed from the Westphalian model only to the degree that they felt necessary to attract political support. An important lesson from the experience of the CEC and CLC is that the battle to ensure effective public participation in an international institution does not end when public participation mechanisms are included in the institution; rather, it is just beginning. Governments that agree to submissions procedures only reluctantly, under the pressure of temporary public attention, may be expected to look for ways to

101. Council Res. 04-03, *supra* note 87. As originally filed, the submission claimed widespread failure to protect migratory birds from logging in Ontario. In keeping with its recent practice, in April 2003 the Council refused to accept the Secretariat recommendation for a broad factual record; rather than reject the recommendation outright, however, the Council gave the submitters a chance to provide additional information to support their claims. Council Res. 03-05, CEC, C/C.01/03-02/RES/05/final (Apr. 22, 2003), http://www.cec.org/files/pdf/COUNCIL/Res-Ontario-Logging_en.pdf. Even after the submitters provided more detailed information, many observers feared that the Council would again refuse to authorize a broad factual record, and would instead direct the Secretariat to investigate only individual allegations in the submission.

undermine them after they begin to operate, especially when the procedures threaten to embarrass the governments. Therefore, institutional support for the procedures, such as an independent secretariat and a committee of experts that can serve as a watchdog over the process, is critically important to their success. It seems probable that the relative success of the CEC procedure is largely due to its administration by an independent secretariat and its oversight by an international advisory committee, which have supported it against governments' attempts to undermine it.

Another important lesson is that public participation may be more important to the success of an international institution than the theoretical possibility of government-triggered sanctions for failure to comply. In the areas of labor and environment, governments will rarely if ever bring claims against one another. Procedures that depend on such claims are worse than useless, no matter how apparently strong their sanctions, since they distract attention from more effective compliance mechanisms and opportunities for cooperation.

Labor and environmental advocates do not seem to have learned these lessons. The 2000 U.S.-Jordan Free Trade Agreement and the 2003 U.S.-Chile Free Trade Agreement are typical of recent U.S. bilateral trade agreements. Although both include obligations to effectively enforce domestic laws that echo the provisions of the NAAEC and the NAALC, and subject the obligations to dispute resolution backed by sanctions, they either say nothing about citizen submissions (Jordan) or adopt the NAALC model (Chile).¹⁰² Nor does either include a joint public advisory committee or an independent secretariat. Although they have been applauded by some advocates dazzled by the possibility of sanctions, the agreements' commitments to ensure effective enforcement are likely to prove empty.

A more recent agreement, the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), signed in August 2004, is a half-step back in the right direction. Like the earlier agreements, it requires the parties to effectively enforce their labor and environmental laws, provides for government-triggered trade sanctions, and includes a labor submissions procedure following the NAALC

102. United States-Chile Free Trade Agreement, arts. 18.2, 18.4, 19.2, 19.4, 22.16. (June 6, 2003), *available at* <http://www.mac.doc.gov/chileFTA/FTAtext.html>; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, arts. 5, 6, 17 (Oct. 24, 2000), 41 I.L.M. 63 (2002), *available at* http://www.Jordanusfta.com/free_trade_agreement_text_en.asp.

model.¹⁰³ The environmental provisions, however, return to the CEC approach, by allowing submissions to be filed with a secretariat that can recommend factual records.¹⁰⁴ The future of the procedure is uncertain, however, because the DR-CAFTA is unclear on whether the secretariat will really be international or independent and because the agreement does not create a joint public advisory committee.¹⁰⁵

The failure of labor and environmental advocates to convince governments to include stronger submissions procedures and public advisory committees in recent trade agreements is unfortunate. Despite the weaknesses of the CEC model, it is far more likely than the chimera of government-triggered sanctions to induce governments to enforce high labor and environmental standards. Governments are increasingly willing to provide for such Westphalian sanctions, secure in the knowledge that they will never be triggered. Meanwhile, labor and environmental advocates are missing opportunities to extend the far more useful post-Westphalian procedures pioneered by the CEC.

103. See Dominican Republic-Central American-United States Free Trade Agreement, (Aug. 5, 2004), arts. 16, 17, at <http://www.ustr.gov> [hereinafter DR-CAFTA].

104. *Id.* arts. 17.7, 17.8.

105. The DR-CAFTA states that the body that receives the submissions will be a "secretariat or other appropriate body . . . that the Parties designate." *Id.* art. 17.7(1). One important advance over the NAAEC, however, is that as drafted, CAFTA would allow the secretariat to prepare a factual record if *any* party instructs it to do so. *Id.* art. 17.8(2).

